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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

FOURTH AGE LTD., *et al*,  
  
Plaintiffs,  
  
v.  
  
WARNER BROS. DIGITAL  
DISTRIBUTION, *et al*,  
  
Defendants.

Case No. 12-9912-ABC (SHx)

**NOTICE OF MOTION AND  
MOTION BY WARNER AND  
ZAENTZ TO DISQUALIFY  
GREENBERG GLUSKER;  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

WARNER BROS. DIGITAL  
DISTRIBUTION INC., *et al*,  
  
Counterclaim  
Plaintiffs,  
  
v.  
  
FOURTH AGE LTD., *et al*,  
  
Counterclaim  
Defendants.

LENS DECLARATION FILED  
CONCURRENTLY HEREWITH

**Judge:** Hon. Audrey B. Collins  
**Magistrate:** Hon. Stephen J. Hillman

**Hearing Date:** July 7, 2014  
**Hearing Time:** 10:00 a.m.

**Discovery Cut-Off:** July 29, 2014

**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on July 7, 2014 at 10:00 a.m., or as soon thereafter as the matter may be heard by the above-entitled court, located at 255 East Temple Street, Los Angeles, California, in Courtroom 680, defendants and counterclaim plaintiffs Warner Bros. Home Entertainment Inc., Warner Bros. Entertainment Inc., Warner Bros. Consumer Products Inc., and New Line Productions, Inc. (collectively, “Warner”) and The Saul Zaentz Company (“Zaentz”) will and hereby do move the Court for an order (i) disqualifying forthwith Greenberg Glusker Fields Claman & Machtinger LLP (“Greenberg”) as counsel in this action for plaintiffs and counterclaim defendants Fourth Age Limited, Priscilla Mary Anne Reuel Tolkien, as Trustee of the Tolkien Trust, The J.R.R. Tolkien Estate Ltd., Harper Collins Publishers, Ltd., Unwin Hyman Ltd. and George Allen & Unwin (Publishers), Ltd. (collectively, the “Tolkien/HC Parties”); (ii) barring the Tolkien/HC Parties from calling Alan Benjamin or William Bernstein as witnesses at deposition or at trial; and (iii) requiring new or separate counsel to examine Benjamin or Bernstein free from any information from Greenberg, if Warner or Zaentz choose to call them as witnesses. Alternatively, to the extent Greenberg is not disqualified now, Warner and Zaentz seek an order (iv) requiring Greenberg to fully disclose its communications with Benjamin and Bernstein, its records, and its notes thereof to the Court for *in camera* review, as well as to MGM (as defined below); (v) ordering the deposition of Bonnie Eskenazi on these matters; and (vi) granting all such other and further relief this Court deems just and proper.


1 the grounds that Greenberg has violated its ethical and professional obligations and  
2 compromised the integrity of this litigation to the prejudice of Warner and Zaentz.

3 Pursuant to Local Rule 7-3, the parties attempted to resolve this dispute  
4 without the Court's intervention. As explained in the accompanying Declaration of  
5 Molly M. Lens, the parties have met and conferred for months in an attempt to  
6 resolve the issues in this motion, including two conferences on April 24, 2014 and  
7 April 30, 2014, but the parties were unable to reach a resolution.

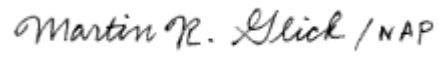
8 This motion is based on this Notice of Motion and Motion; the  
9 accompanying Memorandum of Points and Authorities; the concurrently-filed  
10 Declaration of Molly M. Lens; the Joinder to be filed by non-parties Metro-  
11 Goldwyn-Mayer Inc., Metro-Goldwyn-Mayer Studios Inc., Metro-Goldwyn-Mayer  
12 Pictures Inc. and United Artists Corporation; any additional briefing that may be  
13 filed; all exhibits, files, and records on file in this action; matters of which judicial  
14 notice may be taken; and such additional submissions and argument as may be  
15 presented at or before the hearing on this motion.

16 Dated: June 9, 2014

17 O'MELVENY & MYERS LLP

18  
19 By:   
20 Daniel M. Petrocelli  
Attorneys for the Warner Parties

21  
22 ARNOLD & PORTER LLP

23 By:  / NAP  
24 Martin R. Glick  
25 Attorneys for The Saul Zaentz Company  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Warner and Zaentz bring this motion to disqualify Greenberg as counsel of record for the Tolkien/HC Parties in this litigation and for other relief, because the firm impermissibly gained access to privileged information in violation of Rules of Professional Conduct. This case turns on the interpretation of the 1969 Agreements (the “Agreements”) by which rights to *The Lord of the Rings* and *The Hobbit* were granted to United Artists Corporation (“UA”), which later granted them to Warner and Zaentz. The negotiation, drafting, and meaning of various provisions in the 1969 Agreements are at the heart of this case. With full knowledge that Alan Benjamin and William Bernstein are the former in-house lawyers for UA who represented UA in negotiating and drafting the 1969 Agreements *against* the Tolkien/HC Parties (actually, their prior entities and representatives)—and are the *only living percipient witnesses* on the UA side of the contract, Greenberg contacted them to serve as expert witnesses in this case, offered and undertook to represent them for free as percipient witnesses, and had direct communications with them. Furthermore, Greenberg hired Benjamin as an “expert” and paid him \$10,000.

Greenberg thereby placed itself in the position of representing not only the key witnesses on *both—and opposite—*sides of the contracts at issue, but also its adversaries’ former counsel who worked on the very contracts at issue. In doing so, Greenberg invaded the attorney-client privilege now held by MGM, which controls UA, positioning UA’s former lawyers to be adverse to the interests of MGM and UA’s successors-in-interest, Warner and Zaentz.

Greenberg’s actions infringe important Rules of Professional Conduct:

First, Greenberg violated the prohibition against representing conflicting interests under California Rule of Professional Conduct 3-310(c). This precise circumstance was addressed in *Packard Bell NEC, Inc. v. Aztech Systems LTD.*,



1 2001 WL 880957 (C.D. Cal. Jan. 22, 2001), which held that such dual  
2 representation creates the “potential” that confidential information was improperly  
3 disclosed and warrants disqualification. *See id.* at \*10.

4 Second, Greenberg solicited UA’s former in-house attorneys to violate their  
5 own duties of loyalty and confidentiality by switching sides and testifying  
6 adversely to their former client and its parent company, MGM. In so doing,  
7 Greenberg violated California Rules of Professional Conduct 1-120 and 3-310(e).  
8 As the matter is substantially—indeed, directly—related to the attorneys’ prior  
9 work for UA, the law presumes Greenberg obtained UA’s confidential information,  
10 requiring disqualification. *See Flatt v. Superior Court*, 9 Cal. 4th 275, 283 (1994)  
11 (“Where the requisite substantial relationship between the subjects of the prior and  
12 the current representations can be demonstrated . . . disqualification of the  
13 attorney’s representation of the second client is mandatory.”); *Pound v. Demera*  
14 *Demera Cameron*, 135 Cal. App. 4th 70, 77-78 (2005) (disqualification extends to  
15 all members of any firm).

16 Third, Greenberg has “created the appearance of professional impropriety” in  
17 violation of Canon 9 of the ABA Model Code of Professional Conduct when it  
18 created a mechanism for unfair discovery into confidential information. *See*  
19 *Cargill, Inc. v. Budine*, 2007 WL 1813762, at \*14 (E.D. Cal. June 22, 2007).  
20 Indeed, by paying “expert” fees to Benjamin in addition to representing Benjamin  
21 and Bernstein free of charge as fact witnesses, Greenberg improperly incentivized  
22 the disclosure of privileged information. It is immaterial that Greenberg insists no  
23 privileged or confidential information was actually disclosed. Greenberg’s  
24 undisputed representation and retention of Benjamin and Bernstein establish a  
25 conclusive presumption that privileged and confidential information was disclosed  
26 and warrant disqualification of the firm from further involvement in this action.

1 Compounding these violations, when MGM objected to Greenberg's  
2 representation of and contact with Benjamin and Bernstein, Greenberg did not  
3 immediately cease its engagement, nor did it make a full and candid disclosure of  
4 its contacts. For the next five months, Greenberg continued to assert it was entitled  
5 to represent Benjamin and Bernstein and to maintain as privileged the substance  
6 and details of its communications with them. In response to inquiries from Warner  
7 and Zaentz, Greenberg provided misleading accounts of its interactions with both  
8 lawyers. Although Greenberg eventually agreed to withdraw from representing the  
9 witnesses and terminate the expert engagement, it has insisted on reserving the right  
10 to seek the Court's permission to examine the witnesses at trial and has refused to  
11 turn over its notes of its discussions with the witnesses.

12 In view of these positions and what has come to light about Greenberg's  
13 communications with the lawyers, this motion is necessary. Disqualification is  
14 warranted because Greenberg's retention and use of information disclosed by  
15 Benjamin and Bernstein—in witness examination or otherwise—give the  
16 Tolkien/HC Parties an impermissible advantage and compromise the integrity of  
17 the litigation. Greenberg cannot unlearn the information it has wrongfully obtained  
18 or erase the taint of representing former counsel of its adversaries.

19 Alternatively, disqualification should be deferred pending further discovery,  
20 and in the meantime, Greenberg should be ordered to turn over its notes and  
21 communications involving Benjamin and Bernstein to MGM and the Court for *in*  
22 *camera* review to determine whether any substantive issues in the case—*e.g.*,  
23 online video games, gambling, the meaning of the Agreements—were discussed  
24 with the lawyers. The Court should also order Bonnie Eskenazi, the Greenberg  
25 lawyer who communicated with Benjamin and Bernstein, to sit for deposition on  
26 these matters. Furthermore, in all events, the Tolkien/HC Parties should not be  
27 permitted to call Benjamin or Bernstein at deposition or at trial, and if called by  
28

1 Warner or Zaentz, must be examined by new or separate counsel retained by the  
2 Tolkien/HC Parties, without access to Greenberg's knowledge or information.

3 The clear violations of the ethics rules require action by the Court. As the  
4 Ninth Circuit explained:

5 Whenever an allegation is made that an attorney has violated his  
6 moral and ethical responsibility, an important question of professional  
7 ethics is raised. It is the duty of the district court to examine the  
8 charge, since it is that court which is authorized to supervise the  
9 conduct of the members of its bar. The courts, as well as the bar, have  
10 a responsibility to maintain public confidence in the legal profession.  
This means that a court may disqualify an attorney for not only acting  
improperly but also for failing to avoid the appearance of impropriety.

11 *Erickson v. Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996).

## 12 **II. STATEMENT OF FACTS**

### 13 **A. Benjamin and Bernstein Negotiated, Drafted, and Implemented** 14 **The Agreements at Issue in This Case.**

15 In 1968, UA charged Alan Benjamin and Bill Bernstein, two of its in-house  
16 attorneys, with the task of acquiring the film and merchandising rights in and to *The*  
17 *Lord of the Rings* and *The Hobbit*. See, e.g., Declaration of Molly M. Lens ("Lens  
18 Decl."), Exs. 1-7. UA did not retain outside counsel. Rather, Benjamin and  
19 Bernstein performed the legal work.

20 Benjamin and Bernstein's work culminated in four agreements, referred to by  
21 the parties as the 1969 Agreements. Following the execution of the contracts, UA  
22 tasked Benjamin and Bernstein with dealing with the day-to-day legal issues arising  
23 out of the implementation of the Agreements. *Id.* at Exs. 4-7. This role included  
24 advising UA about the scope of rights granted under the Agreements. *Id.*

25 As a result of various sale and reorganization transactions, Metro-Goldwyn-  
26 Mayer Inc., Metro-Goldwyn-Mayer Studios Inc., and Metro-Goldwyn-Mayer  
27 Pictures Inc. (collectively, "MGM") are the corporate successors to UA's interests  
28

1 in the properties at issue in this case and UA is a subsidiary of Metro-Goldwyn-  
 2 Mayer Studios Inc. Through subsequent agreements, Warner, Zaentz, and MGM  
 3 collectively hold the substantive rights under the 1969 Agreements that UA  
 4 acquired: UA assigned its rights to Zaentz, which, in turn, licensed certain rights to  
 5 Warner Bros; and for its part, MGM, reacquired certain rights in and to *The Hobbit*  
 6 from Zaentz and therefore has a financial interest in the outcome of this action.<sup>1</sup>

7 The Tolkien/HC Parties initiated this action claiming that certain of Warner's  
 8 and Zaentz's merchandising activities exceed the scope of the rights conveyed in  
 9 the 1969 Agreements. Warner and Zaentz contend such activities are fully within  
 10 the scope of their rights, and have counterclaimed.

11 **B. Greenberg Invades MGM's Privilege and MGM Objects.**

12 Greenberg has long known about Benjamin's and Bernstein's direct  
 13 involvement in the 1969 Agreements on behalf of UA. Indeed, that is precisely  
 14 why Greenberg reached out to the lawyers in the first place. In Greenberg's own  
 15 words, it contacted Benjamin and Bernstein because of their "*personal experience*  
 16 *with these issues in 1969.*" *Id.* at Ex. 18. It solicited both Benjamin and Bernstein  
 17 to testify as experts on "film-related merchandising activity in the late 1960s and  
 18 early 1970s" and it offered at no charge to represent both lawyers as percipient  
 19 witnesses. *Id.*

20 As Greenberg fully appreciated, in representing both witnesses, working with  
 21 them, and developing their percipient and expert testimony, Greenberg would be  
 22 delving into matters that directly implicated the witnesses' privileged work for UA.  
 23 Even in their role as putative experts, any inquiry into their "expertise" and  
 24 opinions about the customs, usage, and meaning of film licenses and related  
 25 merchandising rights in 1969 could hardly be divorced from what Benjamin and  
 26 Bernstein actually did, believed, intended, and communicated to their client UA at

27 <sup>1</sup> MGM is a 50% joint copyright owner in *The Hobbit* films and has a financial  
 28 interest in the ability to monetize the rights at issue in this action.

1 the time. Benjamin and Bernstein were the lawyers and direct negotiators in the  
 2 transaction at issue in this case—*opposite* the Tolkien/HC Parties. Their  
 3 expertise—*i.e.*, their understanding and subjective views as to what was meant by  
 4 the language in the contracts at issue here in light of industry practices—were  
 5 formed in the course of their privileged work for their client, UA.

6 On December 27, 2013, within days of learning that Greenberg claimed to  
 7 represent Benjamin and Bernstein, MGM objected to Greenberg’s contact with  
 8 UA’s prior in-house counsel. *Id.* at Ex. 14. MGM demanded that Greenberg  
 9 (1) cease and desist from any further communications with UA’s former attorneys;  
 10 (2) turn over all communications, including engagement letters and notes from its  
 11 conversations; and (3) detail every communication it had had with Benjamin and  
 12 Bernstein. *Id.*

13 C. **Greenberg Refuses to Stop its Misconduct or to Disclose the Full**  
 14 **Extent of its Communications.**

15 A week after receiving MGM’s letter, on January 2, 2014, Greenberg wrote  
 16 to recognize “the seriousness of the issues raised” and promised a substantive  
 17 response “shortly.” *Id.* at Ex. 15. Greenberg assured MGM that it would not have  
 18 any contact with Benjamin or Bernstein until “these issues are resolved.” *Id.*  
 19 MGM then waited. After a few weeks, MGM sent a follow-up email. MGM then  
 20 waited another week and sent another follow-up email. *Id.* at Exs. 16-17. Only  
 21 then—a full month after MGM’s demand—did Greenberg respond on January 27.

22 The January 27 response revealed that Bonnie Eskenazi, plaintiffs’ lead  
 23 counsel, had spoken with Benjamin and Bernstein a number of times. *Id.* at Ex. 18.  
 24 Greenberg disclosed *four* conversations between Ms. Eskenazi and Benjamin and  
 25 *three* conversations with Bernstein. *Id.* Greenberg insisted that Ms. Eskenazi’s  
 26 calls with Benjamin were “limited.” *Id.* The January 27 letter further disclosed that  
 27 Greenberg had retained Benjamin as an expert in February 2013, and that  
 28

1 Greenberg offered to represent both Benjamin and Bernstein in connection with  
2 their percipient witness testimony free of charge. *Id.*

3 MGM responded on February 13, 2014, reiterating its objection to  
4 Greenberg's conduct and repeating its demand for the details of Greenberg's  
5 contacts and any written communications. *Id.* at Ex. 19.

6 In its March 12 response, Greenberg continued to assert that its contact with  
7 Benjamin and Bernstein was not improper. *Id.* at Ex. 21. In that letter, Greenberg  
8 disclosed that it had contacted Benjamin again, despite its representation in January  
9 that it would not have any contact with Benjamin or Bernstein until "these issues  
10 are resolved." *Compare id.* and Ex. 15. Greenberg stated the additional call took  
11 place after MGM's February 13 letter, was for the purpose of informing Benjamin  
12 that his percipient deposition was not going forward, and was "brief." *Id.*

13 On April 4, 2014, MGM sent a response to Greenberg's March 12 letter in  
14 which MGM repeated its concern that Greenberg's conduct had tainted its  
15 continued involvement in this action. *Id.* at Ex. 22. MGM rejected Greenberg's  
16 offer to retain separate counsel to participate in any of Greenberg's future meetings  
17 with Mr. Benjamin. *Id.* Instead, MGM renewed its insistence that Greenberg  
18 immediately cease its representation of Benjamin and Bernstein, that it have no  
19 further contact with either witness, that Greenberg not use either witness as an  
20 expert in this action, and that Greenberg not examine either witness if called to  
21 testify during deposition or trial. *Id.* MGM again asked for copies of all retainer  
22 agreements, notes of discussions, and all communications Greenberg had with  
23 Benjamin and Bernstein. *Id.* MGM also reserved its right to seek additional relief,  
24 including disqualification, depending on what the facts ultimately revealed. *Id.*<sup>2</sup>

25  
26  
27 <sup>2</sup> MGM made these proposals in light of Greenberg's representations that any calls  
28 were limited and did not involve any substantive discussions, which representations  
were not true as later learned.



1 On April 8, 2014, Greenberg said it would terminate its representation of  
2 Benjamin and Bernstein as percipient witnesses and cease using Benjamin as an  
3 expert. *Id.* at Ex. 23. Greenberg stated that it would “no longer use Benjamin as an  
4 expert consultant or witness nor will we continue to represent either Benjamin or  
5 Bernstein in connection with their roles as potential percipient witnesses in this  
6 case.” *Id.* Greenberg, however, reserved the right to seek Court approval to  
7 question Benjamin and Bernstein during a deposition or at trial. *Id.*

8 In letters sent on April 11 and April 14, 2014, MGM, Warner, and Zaentz  
9 objected to Greenberg’s refusal to refrain altogether from questioning Benjamin or  
10 Bernstein during deposition or trial. *Id.* at Exs. 24-25. In addition, Warner and  
11 Zaentz’s April 14 letter pointed out that Greenberg’s April 8 letter revealed that  
12 Greenberg had not been forthcoming with key information about its relationship  
13 with Benjamin and Bernstein—namely, that Greenberg had paid Mr. Benjamin a  
14 retainer for his services and expected testimony in this case. *Id.* at Ex. 25.

15 On April 16, 2014, Greenberg changed its position. Though previously  
16 indicating its representation of Benjamin and Bernstein would end, Greenberg now  
17 suggested that MGM’s and Warner’s “additional demands” were “unsupported by  
18 any legal or ethical rule,” and advised that Greenberg’s “representation of these  
19 witnesses has not actually ended as they have not been advised by us of any  
20 termination.” *Id.* at Ex. 26.

21 In light of the parties’ stalemate, MGM, Warner, and Zaentz participated in  
22 two telephonic meet-and-confer conferences with Greenberg on April 24 and April  
23 30, 2014. During these calls, Greenberg stated that it was no longer willing to  
24 cease its representation of Benjamin and Bernstein unless MGM, Warner, and  
25 Zaentz agreed to drop their objection to Greenberg’s conduct. *Id.* at ¶ 31. MGM,  
26 Zaentz, and Warner refused to agree to this condition, reiterating their position that  
27 Greenberg should terminate its representation. *Id.* In response to direct inquiries,  
28

1 Greenberg also revealed for the first time that it had two to three pages of notes  
 2 from its conversations with Benjamin and that he had signed a written retainer  
 3 agreement. *Id.* Greenberg refused to produce the notes, but promised to look into  
 4 the existence of a call log and consider whether to produce its retainer. *Id.*<sup>3</sup>

5 After the conferences, Greenberg provided no update on these requests for  
 6 weeks, despite a follow-up from Zaentz on May 5, 2014. *Id.* at Ex. 27. On May  
 7 20, 2014, Greenberg agreed to cease its representation of Benjamin and Bernstein.  
 8 *Id.* at Ex. 28. However, Greenberg refused to produce the notes of its  
 9 communications with Benjamin to MGM on the basis that such notes are  
 10 “privileged attorney work product”<sup>4</sup> and continued to reserve the right to seek  
 11 approval to examine the witnesses at trial. *Id.* Greenberg also provided a copy of  
 12 its retainer agreement with Benjamin and a log of its outgoing calls to Benjamin.  
 13 The agreement revealed that Greenberg paid Benjamin (at least) \$10,000. *Id.*

14 The call log revealed information inconsistent with Greenberg’s previous  
 15 representations. First, it showed that Greenberg’s first two calls with Benjamin—  
 16 calls Greenberg had previously described as “limited” discussions—were over 30  
 17 minutes *each*. *Id.* Second, it showed that, collectively, the four calls with  
 18 Benjamin alone totaled over an hour and a half. *Id.* Third, it showed that  
 19 Greenberg’s description of its February call with Benjamin was not accurate.  
 20 Greenberg had claimed that this call took place after MGM’s February 13 letter,  
 21 that it was for the purpose of informing Benjamin that his percipient deposition was  
 22 not going forward, and that it was “brief.” *Id.* at Ex. 19. The log, however,  
 23 revealed that the conversation actually took place on February 10—three days *prior*  
 24

25 <sup>3</sup> Although Greenberg admitted that Ms. Eskenazi is the only Greenberg lawyer  
 26 who communicated with Benjamin and Bernstein and who authored the notes of the  
 27 conversations, Ms. Eskenazi has not been made available to discuss these matters  
 28 directly or respond to our inquiries.

4 Greenberg has also refused to provide these documents in response to discovery  
 requests, taking the position that such documents are, *inter alia*, “irrelevant.”



1 to MGM's February 13 letter and three days *before* Greenberg asked whether the  
 2 deposition was happening—and that this supposedly “brief” call lasted nearly 43  
 3 minutes—bringing the total duration of Ms. Eskenazi's calls with Benjamin to over  
 4 two hours.<sup>5</sup> *Id.* at Ex. 28.

5 In view of these new disclosures and the impasse between the parties,  
 6 Warner and Zaentz wrote to Greenberg on May 30, 2014 asking the firm to  
 7 withdraw as counsel in this action in order to avoid any further litigation of this  
 8 issue and taint to the integrity of these proceedings. *Id.* at Ex. 19. Warner and  
 9 Zaentz detailed the material inconsistencies in Greenberg's accounts of its conduct  
 10 to date. *Id.*

11 Greenberg refused to withdraw, indicated there was “nothing further to  
 12 discuss,” and accused Warner and Zaentz of engaging in a “frivolous tactic brought  
 13 solely for strategic purposes only.” *Id.* at Ex. 32. Greenberg also claimed it had  
 14 “bent over backwards to try and accommodate” MGM's prior demands. *Id.*  
 15 Warner and Zaentz, joined by non-party MGM, now seek the Court's intervention.

### 16 **III. GREENBERG HAS VIOLATED ITS ETHICAL OBLIGATIONS,** 17 **COMPROMISING THE INTEGRITY OF THE PROCEEDINGS**

18 All “attorneys share certain basic obligations of professional conduct,  
 19 obligations that are essential to the integrity and function of our legal system.” *In*  
 20 *re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 603 (1991). These obligations  
 21 include maintaining the duties of loyalty and confidentiality to current and former  
 22 clients, as well avoiding even the appearance of impropriety. *See Erickson v.*  
 23 *Newmar Corp.*, 87 F.3d 298, 300 (9th Cir. 1996); *Trone v. Smith*, 621 F.2d 994,  
 24 998-99 (9th Cir. 1980). To ensure the integrity of the judicial system, the Central

25 <sup>5</sup> This excludes Ms. Eskenazi's conversations with Bernstein, as Greenberg has not  
 26 provided a call log for its outgoing calls to Bernstein. Greenberg claims that no  
 27 such records exist because Bernstein lives locally and Greenberg has represented  
 28 that it does not keep records of outgoing local calls. Greenberg, however, has also  
 refused to produce Ms. Eskenazi's billing entries, which presumably would  
 evidence the timing, duration, and subject matter of her calls.

District requires that all attorneys comply with their ethical obligations, including the California Rules of Professional Conduct and all decisions applicable thereto. L.R. 83-3.1.2; *Davis v. Los Angeles W. Travelodge*, 2010 WL 623657, at \*2 (C.D. Cal. Feb. 3, 2010). As set forth below, Greenberg's conduct has violated several rules of attorney conduct, each of which, standing alone, suffices to require Greenberg's disqualification.

**A. Greenberg Violated Rule 3-310(c).**

Greenberg entered into conflicting representations. California Rule of Professional Conduct 3-310(c) precludes an attorney from accepting or continuing a representation in which the interests of the clients potentially or actually conflict. Here, Greenberg represented and undertook privileged relationships with *both* sides to the 1969 Agreements: it represented, on the one hand, UA's former attorneys who worked on the agreements on behalf of UA and against the Tolkien/HC Parties; and, on the other, it simultaneously represented the Tolkien/HC Parties in this suit for breach of the agreements against MGM's interests and assignees. Greenberg claimed there is no conflict because it did not represent MGM, the corporate entity (of which UA is a subsidiary). Lens Decl. at Ex. 18. That is immaterial. Courts have uniformly held that Rule 3-310(c) applies not only to conflicts with the corporate client, but also to conflicts with its former employees.

*Packard Bell NEC, Inc. v. Aztech Systems LTD.*, 2001 WL 880957 (C.D. Cal. Jan. 22, 2001), is dispositive on this point. In *Packard Bell*, the court disqualified defense counsel who agreed to represent a former executive of the plaintiff as a witness in the litigation. *Id.* at \*5. The court recognized that Rule 3-310(c) did not "literally apply" since defense counsel was representing a former executive of the plaintiff and not the plaintiff itself. *Id.* at \*8. However, the court explained that the ethical mandate in 3-310(c) could not be evaded based on such technicalities. The court reasoned that the former executive, as an agent of the company, owed a

1 continuing duty to protect plaintiff's privileged and confidential information. The  
2 representation of the witness created a conflicting representation—defense counsel  
3 would be required to simultaneously represent the defendant (in terms of prevailing  
4 in the case) and the plaintiff (in terms of protecting plaintiff's privilege). The court  
5 held the conflict between the executive's continuing obligation to protect plaintiff's  
6 privileged information and defendant's interest in winning the lawsuit created an  
7 unacceptable "potential for disclosure" of privileged information. In disqualifying  
8 defendant's counsel for violating 3-310(c), the *Packard Bell* court observed that  
9 even if counsel in such circumstances takes steps to preserve the privilege of the  
10 former employer—and indeed in *Packard Bell*, counsel proffered multiple  
11 declarations stating that no privileged or confidential information was disclosed—  
12 disqualification is still required in light of the "potential" or the "reasonable  
13 probability" of such disclosure. *Id.* at \*9.

14 The potential for improper disclosure of privileged or confidential  
15 information is much higher—if not inevitable—where the former employee was not  
16 a business executive (as in *Packard Bell*) but, like Benjamin and Bernstein, the  
17 actual attorneys who negotiated and drafted the contracts at issue here. *See Huston*  
18 *v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1180  
19 (C.D. Cal. 2001) (holding law firm's misconduct in engaging former attorney of  
20 defendant was worse than misconduct in *Packard Bell*). As in-house attorneys,  
21 both Benjamin and Bernstein, by definition, possessed privileged and confidential  
22 information of their employer, UA.

23 **B. Greenberg Violated Rule 1-120 and 3-310.**

24 Greenberg specifically contracted with Benjamin to be adverse to his former  
25 client, UA, by engaging him as an expert witness to testify against the interests of  
26 UA's successors about the work he did as a lawyer for UA. Rule 3-310(e) prohibits  
27 an attorney from "accept[ing] employment adverse to the client or former client  
28

1 where, by reason of the representation of the client or former client, the member has  
2 obtained confidential information.” Knowing that Benjamin negotiated and worked  
3 on the Agreements at issue, Greenberg engaged him to serve as an expert witness  
4 about those Agreements against the interests of his former client. In doing so,  
5 Greenberg violated Rule 1-120, which precludes an attorney from “knowingly  
6 assist[ing] in, solicit[ing], or induc[ing]” a violation of the Rules. *See Patriot*  
7 *Scientific Corp. v. Moore*, 178 Fed. Appx. 18 (Fed. Cir. 2006) (attorney violated  
8 Rule 3-310(e) by accepting consulting engagement against former client and  
9 plaintiff’s counsel violated Rule 1-120 by inducing and assisting the violation).

10 Greenberg’s conduct also violated Rule 3-310(e) as Benjamin’s conflict is  
11 imputed to Greenberg. For instance, in *Shadow Traffic Network v. Superior Court*,  
12 the court disqualified defendant’s counsel because the counsel retained an expert  
13 previously interviewed by plaintiffs. 24 Cal. App. 4th 1067, 1085 (1994). The  
14 court imputed the expert’s conflict to defendant’s law firm and held it was improper  
15 to hire an expert with confidential information about the opposing party. *Id.*; *see*  
16 *also Complex Asbestos Litig.*, 232 Cal. App. 3d at 597-98 (disqualifying plaintiffs’  
17 law firm that hired paralegal from defense counsel’s firm). Even though the  
18 attorney claimed to have only spoken with the tainted consultant for about 15  
19 minutes, mostly about the consultant’s knowledge of the industry and his ability to  
20 respond to the other side’s damages theory, the court ordered that counsel be  
21 disqualified. *Shadow Traffic*, 24 Cal. App. 4th at 1087. Here, Greenberg’s  
22 discussions with Benjamin spanned at least 2 hours and would have necessarily  
23 included, at a very minimum, his knowledge of the issues and his ability to testify  
24 favorable to the Tolkien/HC Parties, since Greenberg hired him as an expert and  
25 paid him a retainer of \$10,000. Lens Decl. at Ex. 28. Courts have uniformly  
26 recognized that disqualification of the offending law firm is necessary in improper  
27 engagements because the law firm has gained improper access to privileged  
28

1 information. *See, e.g., Anticancer, Inc. v. Xenogen Corp.*, No. 05-00448 (S.D. Cal.  
 2 Aug. 10, 2006) (disqualifying entire firm when adverse party's former lawyer was  
 3 engaged as a "consultant" expert) (Lens Decl. Ex. 33).

4 **C. Greenberg Violated Canon 9.**

5 Canon 9 of the Model Code provides that a "lawyer should avoid even the  
 6 appearance of professional impropriety." The Ninth Circuit has made clear that  
 7 federal courts have the inherent power to apply the Model Code in regulating the  
 8 behavior of lawyers. *See In re AFI Holding, Inc.*, 355 B.R. 139, 153 n.15 (B.A.P.  
 9 9th Cir. 2006). The Ninth Circuit has also made clear that Canon 9 is not mere  
 10 rhetoric, but is a real mandate, such that a violation of Canon 9 alone can be  
 11 sufficient grounds for disqualification of an attorney. *See In re Coordinated Proc.*  
 12 *Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1360 (9th Cir. 1981) ("If Canon 9  
 13 were not separately enforceable, it would be stripped of its meaning and  
 14 significance."); *see also Holm v. City of Barstow*, 2008 WL 4290857, at \*7 (C.D.  
 15 Cal. Sept. 16, 2008) (applying Canon 9 as consistent with Local Rule 83-3 and  
 16 holding that counsel's violation of Canon 9 militated in favor of disqualification).

17 Greenberg has violated Canon 9 by creating a mechanism for impermissible  
 18 access to and discovery of privileged information. This Court has the duty to  
 19 "guard against the inadvertent use of confidential information." *Cargill, Inc. v.*  
 20 *Budine*, 2007 WL 1813762, at \*14 (E.D. Cal. June 22, 2007) (citing *Ceramco, Inc.*  
 21 *v. Lee Pharms.*, 510 F.2d 268, 271 (2d Cir. 1975)). In *Cargill*, a lawyer tried to  
 22 represent a former executive of a company in one action while being adverse to the  
 23 same company in a different action. The court held that the dual representation  
 24 created the "potential for unfair discovery" and the "potential for disclosure of  
 25 confidential information," which created a clear "appearance of impropriety" in  
 26 violation of Canon 9. *Id.* at \*14. As in *Packard Bell, supra*, counsel's assertions  
 27 concerning intentions or efforts to preserve privilege were not relevant given the  
 28

1 real *potential* for abuse. *Cargill*, 2007 WL 1813762, at \*8, \*11 (observing  
2 “presumption” that former employee “did impart confidential information”).

3 Here, as in *Cargill*, Greenberg’s decision to represent and retain UA’s former  
4 attorneys to be adverse to MGM’s interests in this lawsuit creates an obvious  
5 “potential for unfair discovery” and “potential for disclosure of confidential  
6 information” in violation of Canon 9. Greenberg intentionally—and strategically—  
7 put itself in a position to discover privileged and confidential information to which  
8 it otherwise would have no access. And in undertaking to represent both witnesses,  
9 Greenberg shielded them from its adversaries, precluding UA, the holder of the  
10 attorney-client privilege, from being able to speak with its own former lawyers  
11 about the issues in this lawsuit or to protect the disclosure of privileged information  
12 during conversations with Greenberg. UA has no means of safeguarding its  
13 privileged information or even knowing whether it had been disclosed, advertently  
14 or inadvertently. Even if Greenberg claims no privileged information was  
15 disclosed—an assertion Greenberg will not allow to be tested—the arrangement  
16 created an appearance of impropriety that violates Canon 9.

17 Greenberg’s actions are especially fraught with abuse. By offering to retain  
18 Benjamin and Bernstein, both percipient witnesses, as “experts,” Greenberg  
19 incentivized the wrongful disclosure of privileged information. *See Am. Prot. Ins.*  
20 *Co. v. MGM Grand Hotel-Las Vegas, Inc.*, 1986 WL 57464, at \*6 (D. Nev. Mar.  
21 11, 1986) (disqualification of defense attorney because engagement of fact witness  
22 as a trial consultant created an apparent inducement to disclose confidential matters  
23 and payment to a fact witness); *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*,  
24 811 F. Supp. 651, 655 (M.D. Fla. 1992) (“appearance of impropriety” arises from  
25 “inference that an attorney had induced another to breach a confidence” and from  
26 the fact that the “trial consultant” is “actually a fact witness”). Greenberg created  
27 additional incentives to disclose privileged information by offering free legal  
28



1 services to Benjamin and Bernstein. *See Biocore Med. Techs., Inc. v.*  
 2 *Khosrowshahi*, 181 F.R.D. 660, 670 (D. Ka. 1998) (an attorney “can provide an  
 3 inducement by providing free legal service” to an adversary’s former employees).

4 Greenberg knew its actions were ethically improper and would taint these  
 5 proceedings. At the same time that Greenberg was representing and  
 6 communicating with Benjamin and Bernstein, Greenberg wrongly accused Zaentz  
 7 and Warner of having improper contact with a former in-house counsel to the HC  
 8 Parties, Adrian Laing. Lens Decl. at Ex. 11. Zaentz and Warner’s counsel had  
 9 asked Greenberg whether it represented Laing. *Id.* at Ex. 9. Greenberg indicated it  
 10 did not represent Laing and would not contact him in connection with arranging his  
 11 deposition, leaving it up to Zaentz and Warner to do so if they wished to depose  
 12 him. *Id.* An attorney for Zaentz then contacted Laing to ask if he would be willing  
 13 to be deposed without the necessity for international service of process. *Id.* at Ex.  
 14 10. Laing responded that he would if paid for his time, and he contacted Greenberg  
 15 to inform them of the inquiry. *Id.* Apparently forgetting that they had told Zaentz  
 16 and Warner that it was up to them to arrange the deposition of Laing, and  
 17 misunderstanding the nature of the correspondence, Greenberg wrote:

- 18 • “The suggestion that you would meet privately with Mr. Laing  
 19 to ‘prepare him for his deposition’ raises serious concerns about  
 20 a possible invasion of HarperCollins’ attorney-client privilege.”
- 21 • “[B]y nature of Mr. Laing’s role of in-house counsel, virtually  
 22 all of his knowledge or information relevant to this case is  
 23 likely to be privileged or confidential.”
- 24 • “If you or your clients are permitted to meet with Mr. Laing  
 25 without HarperCollins present, there is no way to ensure that  
 26 HarperCollins’ rights will be protected.”

- 1           • Any agreement to compensate Laing “raises significant conflict
- 2           of interest problems and ethical concerns.”
- 3           • Cases “throughout the United States have disqualified law firms
- 4           that agreed to pay an adversary’s former employee for both
- 5           percipient and expert testimony. *See, e.g., U.S. v. SAE Civil*
- 6           *Const.*, 1996 WL 148521, \*2 (D. Neb 1996) (holding that
- 7           paying opposing party’s former president as a trial consultant
- 8           has a natural tendency to induce the former president to reveal
- 9           privileged information); *Transamerica Rental Finance Corp. v.*
- 10          *Rentclub, Inc.*, 811 F.Supp. 651, 655 (M.D. Fl. 1992) (law firm
- 11          disqualified for paying former CFO of opposing party as a fact
- 12          witness and trial consultant); *In re Bell Helicopter Textron,*
- 13          *Inc.*, 87 S.W.3d 139, 151 (Ct. App. Tex. 2002).”
- 14          • “[T]he payment of money to an adversary’s former employee
- 15          creates a strong incentive for the witness to provide any helpful
- 16          information, even if that information is confidential or
- 17          privileged.”
- 18          • “Of course, the risks of disclosure of confidential and
- 19          privileged information are far greater when dealing with an
- 20          attorney than when dealing with a CFO or other employee.”

21 *Id.* at Ex. 11.

22           Greenberg’s position evinces its understanding of the importance of the very  
 23 ethical issues involved in this motion. Indeed, it took this position even though  
 24 counsel for Zaentz only contacted Laing because Greenberg had told Warner and  
 25 Zaentz to coordinate deposition arrangements with him, did not agree or intend to  
 26 otherwise meet with Laing, did not agree to compensate Laing, and instead deferred  
 27 setting his deposition until the parties discussed and resolved jointly how to  
 28



1 proceed. *Id.* at Exs. 9-13.<sup>6</sup> Zaentz also disclosed all of its communications with  
 2 Laing. *Id.* Upon reviewing the correspondence, Greenberg conceded there was  
 3 nothing improper about Zaentz's actions. *Id.*

4 All of this occurred, of course, while Greenberg was actually engaged in the  
 5 very ethical impropriety that it wrongly asserted against Zaentz and Warner and  
 6 that it insisted warranted disqualification. Compounding its misconduct, rather than  
 7 provide a full and accurate accounting of its conduct, Greenberg denied any  
 8 wrongdoing and misled MGM, Warner, and Zaentz about the nature and extent of  
 9 its relationship and communications with Benjamin and Bernstein.

10 **IV. PROTECTIVE ACTION BY THIS COURT IS NECESSARY TO**  
 11 **PRESERVE THE INTEGRITY OF THESE PROCEEDINGS**

12 Courts have "a responsibility to maintain public confidence in the legal  
 13 profession." *Erickson*, 87 F.3d at 300. To ensure the integrity of the proceedings,  
 14 courts are invested with the "the inherent power ... to levy sanctions in response to  
 15 abusive litigation practices." *Columbia Pictures, Inc. v. Bunnell*, 2007 WL  
 16 4877701, at \*5 (C.D. Cal. Dec. 13, 2007); *Leon v. IDX Sys. Corp.*, 464 F.3d 951,  
 17 958 (9th Cir. 2006). Even though Greenberg has now agreed to terminate its  
 18 representation and engagement of UA's former lawyers, Greenberg has not  
 19 disclosed the full extent of its misconduct and still seeks to maintain its unfair  
 20 advantage. Greenberg's continued involvement denies Warner's and Zaentz's right  
 21 to a just and lawful determination of the claims. It does not matter that Warner and  
 22 Zaentz are not the holder of the privilege at issue. *See Decaview Distribution Co.,*  
 23 *Inc. v. Decaview Asia Corp.*, 2000 WL 1175583 (N.D. Cal. Aug. 14, 2000) (non-  
 24 client has standing to move for disqualification if opposing attorney's misconduct  
 25 threatens to prejudice the moving party); *FMC Techs., Inc. v. Edwards*, 420 F.  
 26 Supp. 2d 1153 (W.D. Wash. 2006) (permitting non-client party to move for

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27  
 28 6 The parties have since agreed to split Mr. Laing's per diem three ways.

1 disqualification because the conflict was “so intertwined with the current litigation”  
 2 that it would impede the “just and lawful determination” of claims).<sup>7</sup> Furthermore,  
 3 MGM is affirmatively joining the motion.

4 **A. Greenberg Has Gained an Unfair Advantage.**

5 Greenberg has gained an unfair advantage by invading UA’s attorney-client  
 6 privilege. Greenberg knew that Benjamin and Bernstein were in-house counsel for  
 7 UA, knew they had negotiated the 1969 Agreements, and knew they had privileged  
 8 information relevant to this case. Greenberg targeted the former lawyers, had at  
 9 least eight conversations lasting more than two hours, and paid Benjamin a \$10,000  
 10 retainer to testify against the interests of UA and its parent, MGM.

11 Not surprisingly, Greenberg claims it never acquired any privileged  
 12 information. Since Greenberg has refused to turn over to MGM the notes of its  
 13 communications with Benjamin, there is no way to know how much of MGM’s  
 14 privileged and confidential information has been disclosed. Greenberg’s self-  
 15 serving assurances, however, are neither persuasive nor sufficient.

16 In its January 27 letter, for example, Greenberg insisted that Ms. Eskenazi  
 17 had “not had any substantive conversations with Mr. Benjamin regarding his  
 18 knowledge as a percipient witness in the case” and had “only limited discussions  
 19 regarding his potential expert witness testimony.” Lens Dec. at Ex. 18. The call  
 20 log that Greenberg provided nearly four months later tells a different story. Two of  
 21

22 <sup>7</sup> The law permits non-client parties to assert conflicts if they have a “personal stake  
 23 in the motion.” *Colyer v. Smith*, 50 F. Supp. 2d 966, 971-72 (C.D. Cal. 1999).  
 24 Courts recognize that a non-client party has standing to seek relief when an ethical  
 25 violation “impacts the [non-client] party’s interest in a just and lawful  
 26 determination of [its] claims.” *Id.* at 971-72; *see also Kennedy v. Eldridge*, 201  
 27 Cal. App. 4th 1197, 1205 (2011) (holding non-client party has standing where  
 28 conflict causes “cognizable injury or would undermine the integrity of the judicial  
 process”). UA, as the holder of the privilege in question, has also joined in this  
 motion. Further, in addition to MGM’s, Warner’s, and Zaentz’s interest, the Court  
 itself has “an independent interest in ensuring trials are conducted within ethical  
 standards of the profession and that legal proceedings appear fair to all that observe  
 them.” *In re A.C.*, 80 Cal. App. 4th 994, 1001 (2000); *see also Colyer*, 50 F. Supp.  
 2d at 971-72.

1 those “limited” discussions lasted over 30 minutes each, and collectively, Ms.  
2 Eskenazi’s calls as of January 27, 2014 lasted over an hour and a half. *Id.* at Ex. 28.

3 Further, Greenberg’s claim that it did not discuss the substance of this case is  
4 not credible. Greenberg admitted that Ms. Eskenazi told Benjamin and Bernstein  
5 during their first conversations that Zaentz or Warner may call each of them as a  
6 percipient witness given their “personal experience” with the 1969 Agreements. *Id.*  
7 at Ex. 18. Greenberg also would not have disclosed Benjamin in its initial  
8 disclosures had it not first satisfied itself that Benjamin had knowledge relevant to  
9 the issues in this case. Nor would Greenberg have retained Benjamin as an  
10 expert—and agreed to pay him a \$10,000 retainer—without having had more than  
11 “limited” discussions concerning the substance of this case with him and becoming  
12 satisfied that he would provide favorable testimony. Finally, Greenberg would  
13 not—and could not—claim attorney-client privilege and work product over the  
14 notes Ms. Eskenazi took of her conversations if nothing of substance was discussed.

15 Greenberg’s account of Ms. Eskenazi’s February 2014 call with Benjamin is  
16 illustrative. By then, MGM had already objected to any contact between Greenberg  
17 and its former lawyers. Greenberg claimed that the call was merely a “brief”  
18 discussion to inform Benjamin that his deposition would not be going forward and  
19 that the only subject discussed was Benjamin’s employment history. However, as  
20 the log now reveals, the call was not brief: it lasted almost 43 minutes. Further, the  
21 purpose of the call could not have been to inform Benjamin that his deposition  
22 would not be going forward as Greenberg did not even ask Warner and Zaentz  
23 whether the deposition was going forward until three days later. *Lens Decl.* at Ex.  
24 20. It is also implausible that Ms. Eskenazi discussed Benjamin’s employment  
25 history for 43 minutes—almost a year after Greenberg had already retained  
26 Benjamin as an expert, presumably on the basis of his qualifications.

1 In any event, the law does not expect the parties, or the Court, to accept  
 2 Greenberg's assurances. *See Cargill*, 2007 WL 1813762, at \*11 ("Statements from  
 3 counsel or former employees to the effect that they attempted to preserve any  
 4 attorney-client privilege of the [former employer] while undoubtedly true, are  
 5 unavailing."); *Packard Bell*, 2001 WL 880957, at \*9. To the contrary, the law  
 6 *presumes* that Greenberg acquired privileged and confidential information. *See*  
 7 *Complex Asbestos Litig.*, 232 Cal. App. 3d at 596 ("The presumption is a rule by  
 8 necessity because the party seeking disqualification will be at a loss to prove what  
 9 is known."). The presumption arises because "no matter how well intentioned  
 10 counsel and the witnesses may be, the potential for abuse and mischief is great."  
 11 *Cargill*, 2007 WL 1813762, at \*8.

12 The presumption is particularly strong where, as here, there is substantial  
 13 factual overlap between the work the former lawyers did and the subject of this  
 14 lawsuit. *See Shadow Traffic Network*, 24 Cal. App. 4th at 1051. When this overlap  
 15 exists, it becomes nearly impossible to rebut the presumption because either (a) the  
 16 former agent's knowledge of unprotected matters is necessarily "intermingled with"  
 17 knowledge protected by the attorney-client privilege such that the court cannot be  
 18 sure the parties will "segregate out only those matters that may be disclosed,"  
 19 *Cargill*, 2007 WL 1813762, at \*8, or (b) the privileged information is likely to be  
 20 indirectly disclosed, giving the attorney the benefit of the privileged information  
 21 and eviscerating the privilege, *see Shadow Traffic Network*, 24 Cal. App. 4th at  
 22 1085 (even if former employee did not expressly disclose information, the attorney  
 23 could nevertheless "obtain the benefit of the information" as it could "consciously  
 24 or unconsciously ... shape or effect the [person's] analysis and advice").

25 Greenberg undertook to represent both Benjamin and Bernstein with full  
 26 knowledge of their prior work as UA's attorneys on the very contract at issue—  
 27 indeed, *because* of that prior work. It agreed to represent both lawyers for free. It  
 28

1 also retained Benjamin as an expert, and paid him \$10,000 up front. The “very  
 2 nature of [the attorney-client] relationship is such that confidences should be  
 3 exchanged freely between attorney and client.” *Cargill*, 2007 WL 1813762, at \*8.  
 4 Accordingly, in instances where an attorney enters into an attorney-client  
 5 relationship with a former employee, “courts will conclusively presume [privileged  
 6 matters] were exchanged.” *City Nat. Bank v. Adams*, 96 Cal. App. 4th 315, 327  
 7 (2002) (emphasis added); *Cargill*, 2007 WL 1813762, at \*8. Thus, regardless of  
 8 what Greenberg may now claim was disclosed, the Court must presume that  
 9 Greenberg impermissibly acquired UA’s privileged information.

10 **B. Greenberg Has Not Been Candid about Its Communications**  
 11 **with Benjamin and Bernstein.**

12 Once the parties objected to Greenberg’s misconduct, Greenberg did not  
 13 provide a straightforward explanation of its interactions with Benjamin and  
 14 Bernstein:

- 15 • Greenberg said nothing about Ms. Eskenazi’s notes of her calls with  
 16 Benjamin for nearly four months, and only disclosed their existence in  
 17 response to direct inquiries from MGM, Warner, and Zaentz. It then  
 18 refused to produce the notes, claiming they are “privileged attorney work  
 19 product,” even though Greenberg represented nothing of substance was  
 20 discussed during the calls between Ms. Eskenazi and Benjamin.
- 21 • Greenberg refused to disclose the existence of its retainer with  
 22 Benjamin—or the fact that Greenberg had already paid him—for over  
 23 three months, even though MGM requested such information when it first  
 24 objected to Greenberg’s conduct. When the agreement was later provided  
 25 in response to repeated requests, it showed Greenberg had already paid  
 26 Benjamin at least \$10,000.

- As detailed above, Greenberg described its conversations with Benjamin as “limited” and “brief,” when, in fact, Greenberg’s call log revealed that these conversations were anything but. Further, Greenberg’s assurances that its communications with Benjamin have not covered the substance of this case are not credible.
- Finally, in an attempt to rewrite the record, Greenberg now contends—or will no longer “concede”—that it represented Benjamin and Bernstein as percipient witnesses, contrary to its prior statements to MGM, Zaentz, and Warner. Lens Dec. ¶¶ 9, 11; Exs. 8, 23, & 26.

Although Greenberg’s wrongful contact with, and representation of, Benjamin and Bernstein are more than sufficient to warrant its disqualification, Greenberg’s lack of full candor only underscores the need for such a remedy.

**C. Greenberg’s Continued Involvement Will Irreparably Taint the Integrity of the Proceedings.**

This Court has the authority—indeed, the duty—to disqualify Greenberg from this case. *See Employers Ins. of Wausau v. Albert D. Seeno Const. Co.*, 692 F. Supp. 1150, 1153 (N.D. Cal. 1988) (court has “the duty of supervising the conduct of attorneys practicing before it, and part of that duty is to disqualify counsel”); *Erickson*, 87 F.3d at 300 (“It is the duty of the district court to examine [allegations of unethical behavior]” and the “court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety”).

Disqualification is warranted for several reasons. First, there is no way to ascertain the full extent of Greenberg’s invasion into UA’s privilege. Greenberg has already invoked the attorney-client privilege and work-product doctrines to block inquiry into what it discussed with Benjamin. As a result, there is no way to guarantee that any advantage has been neutralized. *See Cargill*, 2007 WL 1813762, at \*13. Indeed, this is why courts presume that attorney-client information has been



transmitted in such circumstances. *See Complex Asbestos Litig.*, 232 Cal. App. 3d at 596; *Cargill*, 2007 WL 1813762, at \*11; *Packard Bell*, 2001 WL 880957, at \*9. Second, Greenberg cannot “unlearn” information it wrongfully acquired. *See id.* Greenberg “would have the improperly obtained facts instantly available [] in questioning witnesses, making and responding to objections and addressing the court and jury.” *Id.* (quoting *Chronometrics, Inc. v. Sysgen, Inc.*, 110 Cal. App. 3d 597, 607 (1980)). Disqualification thus “serves the useful purpose of eliminating from the case the attorney who could most effectively exploit the unfair advantage.” *Packard Bell*, 2001 WL 880957, at \*10. Disqualification of the entire firm is necessary to eliminate that advantage. *See Pound v. Demera Demera Cameron*, 135 Cal. App. 4th 70, 77-78 (2005). Finally, without disqualification, there will always remain a “nagging suspicion” that Greenberg can exploit the wrongfully acquired information to its advantage. *MWR/Wallace Power & Indus., Inc. v. Thames Associates*, 764 F. Supp. 712, 726-27 (D. Conn. 1991).

Greenberg’s continued participation inherently taints the fairness of this proceeding and requires disqualification. While disqualification has serious consequences and a party has a right to choose its own counsel, those considerations yield to the Court’s “paramount concern [in] the preservation of public trust in the scrupulous administration of justice and the integrity of the bar.” *All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2008 WL 5484552, at \*11 (N.D. Cal. Dec. 18, 2008); *San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 846 (2006). Thus, Greenberg should be disqualified immediately.

Alternatively, if the Court is not prepared to disqualify Greenberg based on the current record, the Court should order Greenberg to turn over its notes, records, and all documents pertaining to its communications with Benjamin and Bernstein to MGM and the Court for *in camera* review to determine whether the conversations did concern the substantive issues in this case—*e.g.*, reference to online rights,

1 video games, gambling, or the meaning of the rights grants in the Agreements. If  
 2 so, Greenberg's representations that nothing of substance was ever discussed would  
 3 be proven false, and the firm should then be immediately disqualified. Disclosure  
 4 of the notes is eminently reasonable. Because Greenberg had no right to MGM's  
 5 privileged information in the first instance, it has no right to retain the "fruits" of  
 6 that information, including "any notes, records, summaries or descriptions." *Conn*  
 7 *v. Superior Court*, 196 Cal. App. 3d 774, 785 (1987).


8 In addition, Ms. Eskenazi should be made available for deposition regarding  
 9 her interactions with Benjamin and Bernstein. The Tolkien/HC Parties should also  
 10 be barred from calling the lawyers at either deposition or at trial, and if called by  
 11 Warner or Zaentz, they can be cross-examined by new counsel or separate counsel.

## 12 **V. CONCLUSION**

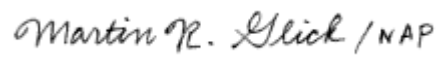
13 Greenberg has violated the basic rules of professional conduct by invading  
 14 UA's attorney-client privilege and obtaining an unfair advantage in this action  
 15 against Warner and Zaentz. Greenberg's continued participation will compromise  
 16 the integrity of these proceedings. The Court must neutralize the unfair advantage  
 17 Greenberg has gained for the Tolkien/HC Parties. Warner and Zaentz respectfully  
 18 request that Greenberg be disqualified as counsel of record in this action.

19 Dated: June 9, 2014

O'MELVENY & MYERS LLP

21 By:   
 22 Daniel M. Petrocelli  
 Attorneys for the Warner Parties

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 24 ARNOLD & PORTER LLP


25 By:  / NAP  
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 28



1 Pursuant to Local Rule 5-4.3.4(a)(2)(i), the filer attests that all other  
2 signatories listed, and on whose behalf the filing is submitted, concur in the filing's  
3 content and have authorized the filing.

4  
5 Dated: June 9, 2014

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